

ESTTA Tracking number: **ESTTA723365**

Filing date: **01/28/2016**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91218738
Party	Plaintiff Abercrombie & Fitch Trading Co.
Correspondence Address	SUSAN M KAYSER JONES DAY 51 LOUISIANA AVENUE NW WASHINGTON, DC 20001-2113 UNITED STATES ipdocketingwest@abercrombie.com, skayser@jonesday.com, jbradley@jonesday.com, nytef@jonesday.com
Submission	Reply in Support of Motion
Filer's Name	Jessica D. Bradley
Filer's e-mail	ipdocketingwest@abercrombie.com, skayser@jonesday.com, jbradley@jonesday.com, nytef@jonesday.com, aprevatt@jonesday.com, kbaird@jonesday.com
Signature	/Jessica D. Bradley/
Date	01/28/2016
Attachments	Reply Brief in Support of Motion to Strike.pdf(184668 bytes) Bradley Declaration.pdf(131975 bytes) Bradley Declaration Ex. 01.pdf(83548 bytes) Bradley Declaration Ex. 02.pdf(260340 bytes) Bradley Declaration Ex. 03.pdf(246341 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE
TRADEMARK TRIAL AND APPEAL BOARD**

ABERCROMBIE AND FITCH TRADING CO.,	§	
	§	
Opposer,	§	
	§	
v.	§	Opposition No. 91218738
	§	
SCHNITTGER, ISABELLA ELISABETH	§	
	§	
Applicant.	§	

**REPLY BRIEF IN SUPPORT OF MOTION TO STRIKE APPLICANT’S TESTIMONY
AFFIDAVIT AND EXHIBITS A, B & D**

Pursuant to the Trademark Trial and Appeal Board Manual of Procedure §§ 707.04 and 502.02(b), Opposer Abercrombie & Fitch Trading Co. (“A&F”) respectfully submits this reply in support of its Motion to Strike the Testimony Affidavit of Applicant Isabella Schnittger and the Affidavit’s Exhibits A, B and D based on procedural deficiencies. On January 8, 2016 Applicant Isabella Elisabeth Schnittger (“Applicant” or “Ms. Schnittger”) served A&F with a response to its motion containing a “revised” testimony affidavit and exhibits (“Applicant’s Revised Testimony”) (TTAB Dkt. No. 23), which attempts to submit inadmissible new evidence outside of her testimony period. Applicant’s response also presents new procedural issues that do not meet the Trademark Trial and Appeal Board rules. This Reply responds to (i) the new issues raised, and (ii) the new material filed by Applicant, in Applicant’s Revised Testimony.

I. “Revised” Exhibit D Is Inadmissible New Testimony Submitted Outside of Applicant’s Testimony Period

Applicant’s “revised” Exhibit D served with Applicant’s Revised Testimony is an entirely new exhibit containing new screenshots from two new websites that were not referenced in or attached to Applicant’s original Testimony Affidavit filed on December 1, 2015

(“Applicant’s Original Testimony”) (TTAB Dkt. No. 19). Paragraph 7 and Exhibit D to Applicant’s Original Testimony discussed and contained images purportedly from the website www.aftshirt.com which Applicant claimed was an A&F website. As established in A&F’s motion (TTAB Dkt. No. 20), and in the Rebuttal Testimony of Reid M. Wilson (TTAB Dkt. No. 22), www.aftshirt.com is a counterfeit website which A&F has sued, and which a court has enjoined. In Applicant’s Revised Testimony, Applicant maintains the same text in Paragraph 7 (including the claim that Exhibit D contains examples of A&F’s use), but replaces the images in Exhibit D with new screenshots from different websites: www.ovashirt.com and www.ooooops.co.uk.

The Board rules direct that “[n]o testimony shall be taken except during the times assigned.” 37 C.F.R. § 2.121(a). The Board has held that evidence submitted outside of a party’s testimony period will be stricken and not considered. *Baseball America Inc. v. Powerplay Sports Ltd.*, 71 USPQ2d 1844, 1846 n.8 (TTAB 2004) (granting opposer’s motion to strike exhibits “submitted outside of applicant’s assigned testimony period”). *See also* TBMP § 706 (“Evidence not obtained and filed in compliance with the rules of practice governing inter partes proceedings before the Board will not be considered by the Board.”) Applicant’s testimony period ended on December 21, 2015. (TTAB Dkt. Nos, 11, 12.) Applicant’s Revised Testimony was not served until January 8, 2016, well outside her testimony period, and accordingly both new Exhibit D and the corresponding paragraph 7 in the affidavit should be stricken.

Additionally, Exhibit D to Applicant’s Revised Testimony violates the Parties’ Joint Stipulation Regarding Testimony and Trial Procedures. (TTAB Dkt. Nos, 11, 12.) In the Joint Stipulation, the parties agreed that evidence submitted during the parties’ respective testimony periods “shall be limited to those documents that were produced by either party during

discovery . . . except that updates to either parties' websites may be introduced into evidence if such update did not exist prior to the close of discovery.” (TTAB Dkt. No. 11 at 1). Neither party produced the screenshots included in Exhibit D to Applicant's Revised Testimony during discovery, and as explained below the websites www.ovashirt.com and www.ooooops.co.uk are not A&F websites. (Bradley Decl. ¶ 3.) Accordingly, Exhibit D to Applicant's Revised Testimony is further inadmissible under the parties' stipulated procedures.

Should the Board decide to admit new Exhibit D to Applicant's Revised Testimony, A&F respectfully requests that the Board then also admit and consider A&F's response to this new exhibit contained herein and in the Declaration of Jessica Bradley being submitted with A&F's Reply Brief. As the parties previously stipulated, the Internet websites through which A&F sells goods bearing Opposer's Mark are www.abercrombie.com and www.abercrombiekids.com. (TTAB Dkt. No. 13, Joint Stipulated Fact No. 18.) As demonstrated by WHOIS records, the websites www.ovashirt.com and www.ooooops.co.uk are not A&F websites, and the products offered for sale on these websites are not A&F products. (Bradley Decl. ¶¶ 4-5, Exs. 2-3.)

II. Other Procedural Issues

A. Applicant's Affidavit

In the cover letter served with Applicant's Revised Testimony, Ms. Schnittger stated that she was submitting an “[a]ffidavit sworn to and subscribed by Applicant before a Notary Public.” However, the documents served on A&F's counsel did not contain any such sworn and notarized affidavit. (Bradley Decl. ¶ 2.) Upon reviewing the USPTO's online TTAB files for this matter, A&F discovered that Applicant's Revised Testimony entered into the TTAB record on January 15, 2016, included a one page notarized affidavit that was filed with the TTAB with Applicant's Revised Testimony (TTAB Dkt. No. 23, p. 2), but was not served on A&F. (Bradley Decl. ¶ 2,

Ex. 1.) The Board requires that “[e]very document filed in an inter partes proceeding before the Board . . . must be served by the filing party upon every other party to the proceeding.” TBMP § 113.01. Applicant’s Revised Testimony fails to meet this requirement because she did not serve the notarized affidavit on A&F.

B. Exhibits A, B and C

Applicant served a CD-ROM with Applicant’s Revised Testimony to purportedly show the date and time she accessed images on the Internet. (*See* TTAB Dkt. No. 23, Revised Testimony Affidavit ¶ 4.) Applicant’s CD-ROM is inadmissible because the Board requires that “all submissions should now be made on paper or through ESTTA.” TBMP § 106.03. “The rules which previously permitted submissions on CD-ROM have been revoked.” TBMP § 106.03. Accordingly, the Board has stricken evidence submitted by CD-ROM or similar media. *Hunter Industries, Inc. v. Toro Co.*, 110 USPQ2d 1651, 1654 (TTAB 2014) (granting a motion to strike exhibits submitted via a flash drive because the Board “does not allow for submission of materials on flash drive or compact disk); *Fair Isaac Corp. v. Consumerinfo.com, Inc.*, 78955572, 2013 WL 5655833, at *2 (Sept. 30, 2013) (holding that because evidence submitted on CD-ROM was “not filed on paper or by electronic means as required under the operative Trademark Rule, they have not be[en] considered in this decision”).

A&F maintains its objection to page 5 of Exhibit A because it still contains only inadmissible Google search results. *See* TBMP § 704.08(b) (“Internet search summaries, which essentially are links to the website pages, are not admissible by notice of reliance.”) The top of page 5 clearly states “moose antler world book - Google Search” and the page just displays a list of images with links running down the left side of the page. The Board has held that such search results are inadmissible. *Edom Laboratories Inc. v. Lichter*, 102 USPQ2d 1546, 1550 (TTAB

2012) (holding that a search summary is inadmissible because it merely offers links to information not otherwise of record).

A&F notes that Applicant appears to have typed dates onto the screenshots she served as Exhibits A, B, C and D with Applicant's Revised Testimony. While the addition of a typed date appears to technically meet the procedural requirement of including a date on material from the Internet, A&F reserves the right to assert substantive objections to such exhibits including but not limited to authenticity, hearsay, and/or lack of probative value with its trial brief.

III. Conclusion

For the foregoing reasons, A&F respectfully requests that A&F's motion be granted and that (1) Exhibit D and corresponding paragraph 7 in Applicant's Revised Testimony be stricken, (2) Applicant be reminded to serve all documents filed with the Board on A&F (3) Page 5 of Ex. A be stricken, and 4) that the purported evidence submitted only via the CD-ROM served with Applicant's Revised Testimony be stricken.

Dated: January 28, 2015

Respectfully submitted,

By: /Jessica D. Bradley/
Susan M. Kayser
Jessica D. Bradley
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
(202) 879-3939
skayser@jonesday.com
jbradley@jonesday.com

*Attorneys for Opposer
Abercrombie and Fitch Trading Co.*

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Reply Brief in Support of Opposer's Motion to Strike has been served on Applicant, Isabella Elisabeth Schnittger, on January 28, 2016, via email at isartdesign7@aol.com and myreddear@aol.com pursuant to the agreement of the parties.

/Allison E. Prevatt/

*Attorney for Opposer
Abercrombie and Fitch Trading Co.*

**UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

ABERCROMBIE AND FITCH TRADING CO.,	§	
	§	
Opposer,	§	
	§	
v.	§	Opposition No. 91218738
	§	
SCHNITTGER, ISABELLA ELISABETH	§	
	§	
Applicant.	§	
	§	

DECLARATION OF JESSICA D. BRADLEY

I, Jessica D. Bradley, declare and state as follows:

1. I am a partner in the law firm of Jones Day, counsel for Opposer, Abercrombie & Fitch Trading Co. (“A&F”). I submit this declaration in support of A&F’s Motion to Strike Applicant’s Testimony Affidavit and Exhibits A, B & D. The matters referred to in this declaration are based upon my personal knowledge, and/or when referencing documents, such documents were reviewed by me and where applicable, were obtained and compiled at my instruction by other attorneys employed by Jones Day.

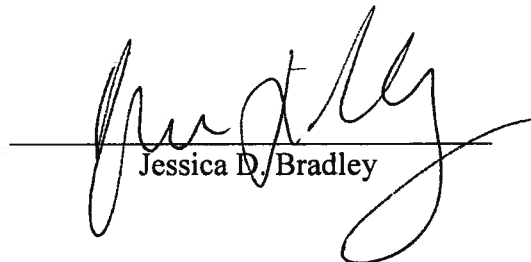
2. On January 8, 2016 Applicant Isabella Elisabeth Schnittger (“Applicant” or “Ms. Schnittger”) served A&F with a Revised Testimony Affidavit and exhibits (“Applicant’s Revised Testimony”) by mailing a package to my attention. The Trademark Trial and Appeal Board (“TTAB”) entered Applicant’s Revised Testimony into its record on January 15, 2016. When I reviewed Applicant’s Revised Testimony entered into the TTAB record I discovered that Applicant filed a one page notarized affidavit with the TTAB that was not served on A&F. A true and correct copy of the affidavit omitted from the packaged served on A&F is attached hereto as **Exhibit 1**.

3. Exhibit D to Applicant's Revised Testimony contained screenshots from the websites www.ooooops.co.uk and www.ovashirt.com. Neither A&F nor Ms. Schnittger produced screenshots from the websites www.ovashirt.com and www.ooooops.co.uk during the discovery period for this opposition.

4. Attached hereto as **Exhibit 2** is a true and correct print-out, dated January 26, 2016, of the WHOIS Record from www.whois.net for the domain name www.ooooops.co.uk, included in Exhibit D to Applicant's Revised Testimony. (TTAB Dkt. No. 23.) The WHOIS record for www.ooooops.co.uk identifies the owner as Agg Stephen, an individual in the United Kingdom. A&F does not own or operate the website www.ooooops.co.uk, or offer A&F products for sale on the website www.ooooops.co.uk.

5. Attached hereto as **Exhibit 3** is a true and correct print-out, dated January 26, 2016, of the WHOIS Record from www.godaddy.com for the domain name www.ovashirt.com, included in Exhibit D to Applicant's Revised Testimony. (TTAB Dkt. No. 23.) The WHOIS record for www.ovashirt.com identifies the owner as Mary Spark, an individual in China. A&F does not own or operate the website www.ovashirt.com or offer A&F products for sale on the website www.ovashirt.com.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on January 28, 2016.



Jessica D. Bradley

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Declaration of Jessica D. Bradley has been served on Applicant, Isabella Elisabeth Schnittger, on January 28, 2016, via email at isartdesign7@aol.com and myreddear@aol.com pursuant to the agreement of the parties.

/Allison E. Prevatt/

Allison E. Prevatt

Bradley Declaration Exhibit 1

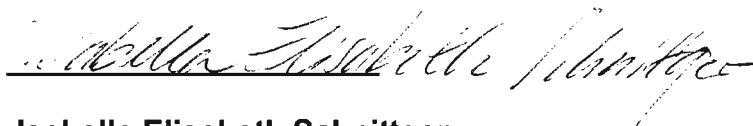
AFFIDAVIT

Greenville County

State of South Carolina

**I, Isabella Schnittger, a resident of Greenville County South Carolina
duly swear the following evidence submitted in the proceeding
Opposition 91218738 of Abercrombie and Fitch is true to the best of my
belief and opposes the Motion to Strike:**

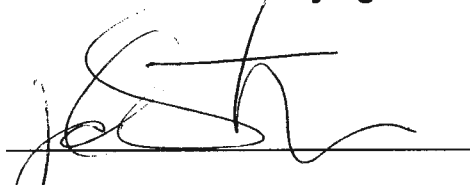
- 1. All the testimony I have given in this case and all the exhibits
submitted I swear under oath was given as true and correct to the
best of my knowledge and belief.**
- 2. I now resubmit such evidence with this affidavit as sworn to be
true and correct to the best of my knowledge and belief.**
- 3. I have obtained the details and missing dates for the exhibits and
links for Exhibit A as to search engines and submit them as well.**
- 4. The information given is easily inspected and can be verified by
the examiner based on the information already submitted.**



Isabella Elisabeth Schnittger

Date: *01/07/2016*

**Sworn to before me this *7th* day of January, 2016, Isabella Elisabeth
Schnittger appeared before me and signed this affidavit with attached
exhibits after identifying herself to me as the affiant.**



Notary Public for South Carolina

Greenville County



Commission expires:

**My Commission Expires
April 7, 2021**

Bradley Declaration Exhibit 2



Bradley Declaration Exhibit 3



